OPINION OF ADVOCATE GENERAL LÉGER

delivered on 9 November 2000 [1]

1. In the present case, the Commission of the European Communities asks the Court to declare that the Italian Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC).

The Commission claims that the Italian Government has failed to fulfil its obligations

(a) by allowing, notwithstanding a subsequent legislative amendment in the matter, the exercise of the profession of dentist to be made conditional, for the persons concerned, upon residence within the practising district to which they belong, and

(b) by maintaining in force, in its internal legal order, a legal provision under which only dentists of Italian nationality may remain on the national register of dentists in the event of transfer of their residence to another Member State.

I — National law

2. On 13 September 1946, the Provisional Head of State of Italy adopted Legislative Decree No 233 on the reconstitution of the associations of the health professions and laying down regulations regarding the exercise of those professions (hereinafter 'the Legislative Decree').

Article 9(e) of the Decree provides that, in order to be registered, a practitioner 'must reside within the practising district of the Council or Board'.

Article 11(b) of the same Decree provides that a registered practitioner is to be removed from the register in the event of 'transfer of residence abroad'.

3. Article 11 of the Legislative Decree was amended by Article 1 of Law No 1398 of

1 — Original language: French.

14 December 1964 (hereinafter 'the 1964 Law'), which states:

'In the case mentioned in point (b), a member of a health profession who exercises his profession abroad or who works abroad in a hospital service, for public authorities or for private persons may, at his request, keep his name on the rolls of the Council or Board from which he had been removed'.

4. On 24 July 1985, the Italian Republic adopted Law No 409 on the profession of dental surgeons and laying down provisions concerning the right of establishment and the freedom to provide services of dentists who are nationals of Member States of the European Communities (hereinafter 'the 1985 Law').

The sixth paragraph of Article 9 of the 1985 Law states that 'the appropriate professional Council shall carry out the procedure of enrolment in accordance with the laws in force at the time'.

Furthermore, Article 15 of the same Law states that 'dental surgeons of Italian nationality who transfer their residence to another Member State of the European Communities may, on request, remain on the relevant Italian dental register'.

5. On 8 November 1991, the Italian Republic adopted Law No 362 laying down rules regarding the reorganisation of the pharmaceutical sector (hereinafter 'the 1991 Law').

This Law amended Article 9(e) of the Legislative Decree, which now provides that, to be on the register, a practitioner 'must reside or exercise his profession within the district of the Council or Board'.

6. It is apparent from the documents before the Court [2] that the regulations of the Council of Medical Surgeons and Dental Surgeons of the province of Imperia, [3] adopted in 1991, contain provisions identical to the original version of the Legislative Decree.

Firstly, these rules require, for the purpose of enrolment, that the practitioner be resident in the district of the Council or Board to which he belongs [Article 9(e)]. Secondly, it provides that a practitioner is to be removed from the register in the event of transfer of residence abroad [Article 11(b)].

2 — Annex 5 of the application lodged by the Commission.

3 — Hereinafter 'the regulations of the Council of the province of Imperia'.

II — Facts and procedure

7. In response to a parliamentary question put by Jessica Larive in 1995,[4] the Commission considered that the provisions of the regulations of the Council of the province of Imperia — concerning the residence requirement and the obligatory removal from the register — were contrary to Articles 48 and 52 of the Treaty.

8. On 17 March 1997, the Commission therefore decided to initiate the procedure under Article 169 of the EC Treaty (now Article 226 EC) and to give the Italian authorities notice to submit their observations within a period of two months.

9. The Italian authorities responded on 26 August 1997. They indicated that, because of the amendments brought about by the Laws of 1964 and 1991, the provisions of the Legislative Decree now complied with the principles of free movement of workers and freedom of establishment.

10. The Commission repeated its criticisms in its reasoned opinion which it addressed to the Italian Republic on 11 June 1998.

11. The Italian authorities responded to this opinion by a letter of 23 December 1998.

12. Taking the view that this response was insufficient, the Commission brought this action on 30 April 1999.

13. The Commission asks the Court to declare that the Italian Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty:

'— by allowing the Legislative Decree of the Provisional Head of State No 233 of 13 September 1946, despite amendment by Article 9 of Law No 362 of 8 November 1991, to remain in force in such a way as to leave dentists practising in Italy still subject to a *de facto* residence requirement, [and]

— by maintaining in force Article 15, Title IV of Law No 409 of 24 July 1985, which refers to Article 1 of Law No 1398 of 14 December 1964, having the effect that only Italian citizens may remain registered in case of transfer of residence to another Member State'.

4 — Written question E-1715/95 of 21 June 1995 (OJ 1995 C 227, p. 20).

14. The Italian Republic asks the Court to dismiss the action and to order the Commission to pay the costs of the proceedings.

III — Arguments put forward by the parties

15. In their statements, the parties distinguished the residence requirement laid down in Article 9(e) of the Legislative Decree from the obligatory removal from the register in the event of residence being transferred abroad, stipulated by Article 15 of the 1985 Law.

The residence requirement

16. The Commission claims that the residence requirement imposed by the Italian authorities constitutes a barrier to freedom of establishment. It submits that such a requirement prevents dentists established in another Member State from opening and running a second dental surgery on Italian territory without transferring their residence to that territory. [5]

In the same way, the residence requirement constitutes an obstacle to the free movement of workers since it prevents dentists established in another Member State from practising as employees on Italian territory.

Furthermore, the residence requirement is not justified either by the necessity to guarantee respect for the medical code of ethics or by a concern to guarantee continuity in medical treatment. [6]

17. The Commission also calls into question the legislative technique adopted by the Italian authorities, in amending the Legislative Decree — that is to say a piece of general legislation — by a sectoral law relating to pharmacists — the 1991 Law.

The Commission considers this legislative technique to be inappropriate in that it creates an uncertain and confusing legal situation, incompatible with a proper application of Articles 48 and 52 of the EC Treaty.

This is evidenced, according to the Commission, by the fact that the regulations of the Council of the province of Imperia continue to impose a residence requirement on dentists who wish to practise in this

5 — The Commission cites, in particular, Case 107/83 *Klopp* [1984] ECR 2971, and Case C-55/94 *Gebhard* [1995] ECR I-4165.

6 — The Commission cites Case 96/85 *Commission* v *France* [1986] ECR 1475.

district, notwithstanding the abovementioned amendment. In addition, the National Federation of Council of Medical Surgeons and Dental Surgeons (hereinafter the 'National Federation') had confirmed, in a letter dated 16 January 1998,[7] the necessity for 'a Member State national who intends to practise the profession [in Italy] to reside within the province in which they are registered'.

18. The Italian Republic is of the opinion that the Legislative Decree is compatible with Articles 48 and 52 of the EC Treaty.

It points out that Article 9(e) of the Decree was expressly amended by the 1991 Law. This provision now provides that, in order to be registered, the applicant practitioner must *either* be resident within the relevant practising district *or* practise his profession within that district. This last requirement — the practice of the profession within the relevant practising district — is compatible with the right of establishment and the free movement of workers.[8]

19. The Italian Government also argues that the legislative technique used does not leave room for any uncertainty. According to the rules of interpretation in force in the Italian legal system, Article 9(e) of the Legislative Decree is equally applicable to dentists. Any other interpretation of Italian law would be arbitrary.

The obligatory removal from the register in the event of transfer of residence

20. The Commission also claims that the obligatory removal from the register in the case of residence being transferred abroad — provided for in Article 11(b) of the Legislative Decree — constitutes an obstacle to freedom of establishment and to the free movement of workers.[9]

According to the Commission, such a measure has the effect of preventing dentists established and resident in another Member State from opening a second surgery or from working as employees on Italian territory. Furthermore, this measure is discriminatory in that it does not prohibit dentists established in Italy from opening a second surgery in another Member State, on condition that they remain resident in the practising district to which they belong in Italy.

7 — Annex 11 of the Commission's application.

8 — The Italian Republic refers to the cases of *Klopp* and *Gebhard*, cited above.

9 — The Commission cites Case 96/85 *Commission* v *France*, cited above.

21. The Commission adds that Article 15 of the 1985 Law did not cure the breach of the EC Treaty since Article 15 only allows dentists of Italian nationality to remain on the register in the event of transfer of residence.

22. The Italian Republic claims that Article 15 of the 1985 Law, even if it does allow only dentists of Italian nationality to remain on the register in the event of transfer of residence, is not contrary to Articles 48 and 52 of the EC Treaty.

According to the Italian Republic, the Italian legislation must be interpreted in accordance with the right of establishment enjoyed by nationals of other Member States. The Italian Government points out that Article 11(b) of the Legislative Decree was amended by the 1964 Law so that any person practising a health profession in Italy can, on request, remain on the register when transferring residence to another Member State. Accordingly, the Italian legislation should be interpreted to the effect that the Legislative Decree, as amended by the 1964 Law, notwithstanding Article 15 of the 1985 Law, also allows nationals of other Member States to remain on a register in Italy when they transfer residence to another EU Member State.

IV — Opinion

23. The two complaints raised by the Commission against the Italian Republic concerning the residence requirement and the obligatory removal from the register in the event of transfer of residence abroad must be considered in turn.

The residence requirement

24. According to settled case-law, the Court considers that 'the right of establishment [guaranteed by Article 52 of the EC Treaty] precludes a Member State from requiring a person practising a profession to have no more than one place of business within the Community'. [10]

25. The Court has repeatedly held that 'freedom of establishment is not confined to the right to create a single establishment within the Community, but entails the right to set up and maintain, subject to observance of the relevant professional rules of conduct, more than one place of work within the Community'. [11]

10 — Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, at paragraph 21.

11 — Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877, at paragraph 11. See also Case 107/83 *Ordre des avocats* v *Klopp* [1984] ECR 2971, at paragraphs 18 and 19; Case 270/83 *Commission* v *France* [1986] ECR 273, at paragraph 15; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897, at paragraph 11; and *Ramrath*, at paragraph 20.

26. In *Stanton* v *INASTI*, [12] the Court also stated that these considerations are 'equally true in respect of a person who is employed in one Member State and wishes, in addition, to work in another Member State in a self-employed capacity'.

27. The Court considers that '[t]he provisions of the Treaty relating to the free movement of persons are thus intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State'. [13]

28. It follows from this settled case-law of the Court that Articles 48 and 52 of the Treaty preclude national legislation which makes the exercise of the profession of dentist conditional upon residence in the district of the register on which practitioners wish to be enrolled.

As the Commission rightly points out, such a rule prevents dentists established in another Member State from opening and running a second dental surgery on Italian territory. In the same way, such a measure constitutes an obstacle to the free movement of workers since it prevents dentists established in another Member State from practising as employees in the host Member State without transferring their residence there.

29. In the present case, the documents before the Court show nevertheless that the provisions of the Italian legislation are in themselves in conformity with the requirements laid down by Articles 48 and 52 of the EC Treaty.

It is sufficient to recall that Article 9(e) of the Legislative Decree — which originally provided that, in order to be on the register, a practitioner must 'reside within the district of the Council or Board' — was expressly amended by the 1991 Law [14] to this effect:

'Point (a) of the first paragraph of Article 9 of Decree No 233 of 13 September 1946, adopted by the Provisional Head of State'... is replaced by the following [point] '... have their residence *or practise their profession* within the district of the Council or Board'. [15]

12 — Cited above, at paragraph 12.

13 — *Stanton*, at paragraph 13. See also *Ramrath* (cited above), at paragraph 28; and Case C-18/95 *Terhoeve* [1999] ECR I-345, at paragraph 37.

14 — Annex 6 of the Commission's application.

15 — Article 9, paragraph 1, of the 1991 Law (translation, emphasis added).

Furthermore, the Italian Government has explained the reasons for which, under the rules of interpretation in force in Italy, the field of application of the 1991 Law is not limited to the pharmaceutical sector alone, but also covers dentists. [16]

30. Therefore, the Italian legislation no longer formally contains any provision that makes the practice of the profession of dentist conditional upon a residence requirement. [17]

31. However, the formal compliance of the Italian rules with Articles 48 and 52 of the EC Treaty is not sufficient to discharge the Italian Republic of its obligations under these provisions. [18]

32. Indeed, in another area of Community law, that of the free circulation of goods, the Court has ruled that:

'As an indispensable instrument for the realisation of a market without internal frontiers, Article 30 [of the Treaty]... does not prohibit solely measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State *abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State*'. [19]

The Court considered that 'the fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act'. [20]

33. Accordingly, the Court could find that the Italian Republic has failed to fulfil its obligations under Articles 48 and 52 of the Treaty, in conjunction with Article 5 of the EC Treaty (now Article 10 EC), if it appeared that Italy had abstained from taking the necessary measures to prevent obstacles to freedom of establishment and the free movement of workers which are not caused by the State.

16 — Defence (p. 5 of the French translation).

17 — This point is not, however, contested by the Commission (see points 1 and 3 of the Commission's reply).

18 — See, to this effect, Case 21/84 *Commission* v *France* [1985] ECR 1355, at paragraph 11.

19 — Case C-265/95 *Commission* v *France* [1997] ECR I-6959, at paragraph 30 (emphasis added).

20 — Case C-265/95 *Commission* v *France*, cited above, at paragraph 31.

34. In the documents produced by the Commission, the Court has a document which helps it to determine whether the Italian authorities have actually taken the measures required to ensure respect of these two fundamental freedoms in Italy. [21]

It is a letter of 16 January 1998 from the President of the National Federation in response to a request for information from the Imperia Council about the obligatory nature of the residence requirement in question. The letter reads as follows:

'In response to your letter of 17 December 1997, reference no. 2864, we would inform you that neither the Minister for Health nor the Minister for Foreign Affairs have replied to our question concerning the Italian residence requirement for Community nationals wishing to practise the profession in Italy.

In the absence of these responses, we can only confirm that a Community national who wishes to practise the profession in our country must, in accordance with our national law, reside in the district of the provincial Council in which they wish to practise'. [22]

35. I believe that by putting this document before the Court the Commission has produced evidence of two factors which show that Italy has failed to fulfil its obligations.

36. Firstly, the Commission has established that, notwithstanding the amendment of the Legislative Decree by the 1991 Law, the Italian supervisory authorities continue to impose a residence requirement on Community nationals who wish to practise as dentists in their territory.

Indeed, in his letter of 16 January 1998 the President of the National Federation expressly confirmed 'that a Community national who wishes to practise the profession in [Italy] *must*, in accordance with [the] national law, *reside in the district of the provincial Council in which they wish to register*'. [23]

37. In this regard, certain evidence gives grounds for assuming that the residence requirement in question is applied throughout a significant part of Italy.

First, the letter produced by the Commission came from the '*National*' Federation of medical surgeons and dental surgeons, in

21 — Annex 11 of the application.

22 — Translation.

23 — Emphasis added.

other words the supervisory authority which is responsible for the entire national territory. The context of this correspondence reveals that certain provincial Councils turn to the National Federation to determine how to interpret Italian legislation.

In its defence, the Italian Government did not actually dispute the fact that many provincial Councils did follow the interpretation recommended by the National Federation. It stated that, since the provisions of the Legislative Decree were in accordance with Articles 48 and 52 of the Treaty, the fact 'that some local Councils may have misinterpreted the legislation... in considering that the residence requirement was still in force' did not matter. [24]

38. Second, the Commission has proved that the Italian Government had knowingly abstained from taking measures which would have precluded the supervisory authorities from maintaining the contested residence requirement.

It is apparent from the letter of 16 January 1998 that, before replying to the question posed by the Council of the province of Imperia, the National Federation took the trouble to approach the Minister for Health and the Minister for Foreign Affairs to find out their positions on 'the residence requirement for Community nationals who wish to practice in [Italy]'.

It is established that the two Ministers approached never gave any response to the question and that their failure to reply constitutes precisely the reason that the National Federation gives for retaining the disputed interpretation.

The President of the National Federation wrote that 'neither the Minister for Health nor the Minister for Foreign Affairs have replied to [his] question' and that '*in the absence of these responses, we can only confirm* that a Community national who wishes to practise in [Italy] must... reside in the district of the provincial Council in which they wish to register'. [25]

39. In those circumstances, I consider that the Italian Republic has failed to take the necessary and appropriate measures to prevent Community nationals wishing to practise as dentists in Italy from remaining subject *in practice* to a residence requirement.

24 — Defence (p. 6 of the French translation).

25 — Letter of 16 January 1998 (emphasis added).

40. I therefore propose that the Court find that the Italian Government has failed to fulfil its obligations under Articles 5, 48 and 52 of the Treaty.

The obligatory removal from the register in the event of transfer of residence

41. The Commission's second complaint relates to the provisions of Italian law concerning the obligatory removal from the register in the event of transfer of residence abroad.

42. In Case 96/85 *Commission* v *France*,[26] the Court held that a Member State could not make the practice of dentistry in that Member State conditional, for dentists established in another Member State, upon their removal from the register in that other Member State. The Court considered such a condition to be contrary to the Treaty provisions that guarantee the free movement of persons.

43. The conclusion reached by the Court in the abovementioned case may be applied to the situation of a dentist who wishes to transfer his residence to another Member State of the European Union. Indeed, the objections in that case would be identical to the objections to a national law that stated that dentists wishing to transfer their residence to another Member State must be removed from the register of dentists in their original Member State.

44. In the present case, Article 11(b) of the Legislative Decree — which originally provided that removal from the register took place in the case of 'transfer of residence of the registered practitioner abroad' — has been amended twice.

First, Article 1 of the 1964 Law provided that 'a member of a health profession who practises his profession abroad... may, on request, remain on the Council or Board from which he had been removed'.

Second, Article 15 of the 1985 Law states that: 'Dental surgeons of Italian nationality who transfer their residence to another Member State of the European Communities may, on request, remain on the relevant Italian dental Council.'

45. As the Commission points out, Article 15 of the 1985 Law does not bring the Italian legislation into accordance with Articles 48 and 52 of the Treaty.

26 — Cited above (see especially paragraphs 12-15).

Article 15 reserves only to Italian citizens the possibility of remaining on the register in the event of transfer of residence. Therefore there is a difference of treatment, ostensibly based on the nationality of practitioners, even though the Community provisions concerning the right of establishment and free movement of workers 'prohibit in their respective fields of application any discrimination on the ground of nationality'. [27]

46. The Italian Government nevertheless submits that, notwithstanding its wording, Article 15 of the 1985 Law must be interpreted in the light of the right of establishment and of the amendment to the Legislative Decree contained in the 1964 Law. It considers that, under such an interpretation, the Italian legislation authorises all Community nationals to remain on the register when they transfer residence to another Member State.

47. I do not think that the Italian Government's view should be accepted.

48. The Court has consistently ruled that a breach of obligations by a Member State can arise simply from maintaining in force a national law which is incompatible with Community law irrespective of the application of the provision in practice.

The Court considers that 'if a provision of national law that is incompatible with a provision of the Treaty... is retained unchanged, this creates an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law and that maintaining such a provision in force therefore amounts to a failure by the State in question to comply with its obligations under the Treaty'. [28]

49. However, in the present case, the Italian Government has admitted the necessity to end the ambiguity created by its legislation by stating that 'to clear up any doubt on the subject, the Council of Ministers... has already announced... a legislative initiative to specify that this right [to maintain enrolment in the case of transfer of residence] extends to all dentists of the Member States'. [29]

27 — Case 38/87 *Commission* v *Greece* [1988] ECR 4415, at paragraph 6. See also, among others, Case 33/88 *Allué and Cooman* [1989] ECR 1591, at paragraph 11.

28 — Case 168/85 *Commission* v *Italy* [1986] ECR 2945, at paragraph 11. See also Case 167/73 *Commission* v *France* [1974] ECR 359, at paragraphs 34-48; Case 159/78 *Commission* v *Italy* [1979] ECR 3247, at paragraphs 20-23; and Case C-58/90 *Commission* v *Italy* [1991] ECR I-4193, at paragraphs 12 and 13.

29 — Defence (p. 8 of the French translation).

50. Accordingly, I suggest that the Court should find that, by maintaining Article 15 of the 1985 Law in its internal legal order, the Italian Republic has failed to fulfil its obligations under Articles 48 and 52 of the Treaty.

51. I also propose that the Court order the Italian Republic to pay the costs of the proceedings, in accordance with Article 69(2) of the Rules of Procedure and with the Commission's claims.

Conclusion

52. On the basis of the foregoing considerations, I therefore propose that the Court declare that

(1) The Italian Republic has failed to fulfil its obligations under Articles 5 of the EC Treaty (now Article 10 EC) and 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC) in:

— failing to take the necessary and appropriate measures to prevent the Italian supervisory authorities from continuing, notwithstanding the amendment contained in Law No 362 of 8 November 1991, to apply Legislative Decree No 233 of 13 September 1946 adopted by the provisional Head of the Italian State in such a way that Community nationals wishing to practise as dentists in Italy remained in practice subject to the obligation to reside in the district of the professional Council to which they apply for registration, and

— maintaining in force Article 15 of Law No 409 of 24 July 1985 which allows only Italian dentists to remain on the dental register of their professional Council in the case of transfer of residence to another Member State.

(2) The Italian Republic is ordered to pay the costs.